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In The
Supreme Court Of The United States
October Term, 2002

DEPT. OF PUBLIC SAFETY ON BEHALF OF HENRY C. LEE, Comm., OFFICE OF ADULT PROBATION, ON BEHALF OF ROBERT BOSCO, DIRECTOR, JOHN ARMSTRONG, COMMISSIONER

Petitioners,

v.

SAMUEL POE,
JOHN DOE

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Through its Sex Offender Registry, Connecticut makes available to the public truthful information about convicted sex offenders. Unlike the Respondents, the State trusts its citizens to evaluate appropriately this truthful information in deciding how best to protect themselves and their families. The Constitution does not require the withholding of such truthful information, lawfully in the hands of government, absent an evaluation of dubious reliability regarding each convicted sex offender's future dangerousness.

The communication of truthful information, coupled with the explicit disclaimer that the State has made no determination about the dangerousness of any particular individual, does not and cannot imply that any one individual is dangerous. If the Respondents are stigmatized, it is because they are convicted sex offenders, not because of any purported implicit message arising from the context or composition of the Registry website. Moreover, because the requirements of registration are independent of whether the registration information is publicly

disseminated, the Respondents' rights or legal status are not altered by or because of the Registry's availability to the public. The Respondents' obligation to provide the information required by registration continues. The only difference is that, under the ruling the Respondents seek, the public is denied the opportunity for meaningful access to truthful information. Public availability of the truthful Registry information does not deprive the Respondents of liberty within the meaning of the Constitution.

I. PUBLIC AVAILABILITY OF THE TRUTHFUL REGISTRY INFORMATION DOES NOT CONSTITUTE DEFAMATION.

To establish the deprivation of a reputation-based liberty interest, the Respondents must first demonstrate that the communication in question is defamatory and false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-12 (1990). The Respondents cannot do so for several reasons.

The dissemination of truthful information about the Respondents, accompanied by a statement disclaiming any representation regarding the dangerousness of any one individual, simply does not stigmatize in a way that gives rise to a claim for defamation, let alone in a way that implicates the Due Process Clause. The Respondents contend that they are stigmatized because the undifferentiated nature of the Registry sends an implied message that every individual on the Registry is dangerous. Identification as having been convicted of a sex offense may indeed be a stigma; however, this opprobrium results from the conviction, not from the public communication of that identification. Finally, not only is the information provided in the Registry true and objectively verifiable, but any "inference" the Respondents or the Court of Appeals attribute to the Registry is incapable of being proved "true or false."

A. Connecticut's Registry Is Not "Undifferentiated" And Does Not Implicitly Defame.

The Respondents concede that only accurate, verifiable information is explicitly stated in the Registry with respect to any single registrant, and they do not claim that any inaccuracy exists in the general information provided in the introduction to the Registry. Although the Respondents dispute the efficacy of the

disclaimer, they do not suggest that its plain language is false. Further, they do not dispute that the Registry contains a warning against using Registry information to harm any person. Thus, the Respondents are left to assert that they are stigmatized by an *inference* that *might* be drawn from the accurate information made available to the public.

The inference that the Respondents claim arises from the Registry – which they claim gives rise to a defamation action and, in turn, to a § 1983 action – is that all registrants are "currently dangerous." Re. Br. 16. The Court of Appeals drew a different inference: that members of a group of persons convicted of a crime are more likely than the average person to commit another crime, a conclusion hardly worthy of debate.[1] JA 251.

The Respondents take issue with numerous contextual characteristics of Connecticut's Sex Offender Registry, especially as it appears on the Internet, and the Petitioners respond to these claims in the next section. *See* § I.B, *infra*. Standing alone or collectively, these characteristics do not connote current dangerousness and are not of constitutional magnitude. Neither is that really what this case is about, as litigated or decided.[2] Rather,

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[1] The Court of Appeals specifically rejected the notion that the inference the Respondents advance could be drawn from the publication of the Registry information, stating that it could "not conclude . . . that visitors to the website necessarily understood it to say *or imply* that all of the registrants are in fact currently dangerous." JA 250 (emphasis added). Indeed, "shar[ing] some of the State's doubt," JA 249, and finding the District Court's opinion "not entirely clear," JA 248, the Court of Appeals stated:

> Even the disclaimer itself, by asserting that the DPS 'has made no determination that any individual included in the Registry is currently dangerous,' . . . implies that some may be. . . . We *think* that it *follows* that publication of the Registry *implies* that each person listed is *more likely than the average person to be currently dangerous*."

JA 251 (emphasis added).

[2] For example, Registrants could be listed without a current photo or without a current address; the Legislature could included fewer offenses within the definition of "sexual offenses"; the State could change the title of the website from "Sex Offender Register" or stop calling the individuals "registered" sex offenders; or the disclaimer could be made more airtight, explict or to the Respondents liking. Under the Court of Appeals' analysis, however, a defamatory "inference" would arise nonetheless, and presumably the Respondents would make the same constitutional claim. The Registrants would

both the Respondents and the courts below attribute their respective implications of danger to the "undifferentiated" nature of the Registry: that is, that all registrants are indistinguishable. JA 145-47, 250-51; Re. Br. 16-17.

The characterization of the Registry as undifferentiated is simply incorrect. Registrants are differentiated in very meaningful ways: by precise nature, number and age of convictions. The persistent theme of the Respondents' argument is that different offenders are juxtaposed against one another in an undifferentiated fashion, causing less serious offenders to be stigmatized. In fact, registrants are only truly undifferentiated from (and juxtaposed against) those with similar types, number and age of convictions. For example, the public can readily distinguish a registrant convicted several years ago of one act of Sexual Assault in the Fourth Degree from one with multiple or recent convictions for Sexual Assault in the First Degree. The Respondents suggest that registrants should be further differentiated by risk level, e.g., "low," "medium," or "high." It is difficult to discern how the addition of this sort of debatable, subjective, and very likely unreliable information would either reduce stigma or increase the accuracy and utility of the web site.

It is certainly not obvious that the inclusion of risk assessments by "experts," arbitrators or governmental bureaucrats would result in a more accurate web site. While the public may not be able to distinguish two offenders convicted of the same offense on roughly the same date based simply on Registry information, it is also not clear that "experts" could do a better job of assessing the relative risk of two such offenders, particularly given that type, number and age of convictions are traditionally considered key factors in assessing the risk of reoffense. Indeed, a member of the public, balancing the Registry information against her own knowledge and observations of the registrant in the community, might well make an equally or even more accurate assessment of an offender's risk than that resulting from a judicial or administrative risk assessment process.

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still be undifferentiated and allegedly defamed by their association with one another.

The Respondents, have their own view of what type of "differentiation" is appropriate in such a Registry, however, and urge this Court to adopt it as a matter of constitutional law. Specifically, they argue, and the Court of Appeals held, that the government may not constitutionally provide to its citizens the true and objectively verifiable information it maintains in the Registry until the government has made individualized, subjective assessments or predictions about how someone will act in the future: that is, how likely it is they will reoffend.

As argued in the Petitioners' opening brief, and as amplified below, no constitutional rights are infringed, principally because the Registry does not give rise to a false inference of "current dangerousness" that can properly serve as the predicate to a defamation action or a Due Process Claim. Moreover, dictating to the States how sex offender Registry information must be compiled and disseminated is inconsistent with the Wetterling Act and with well established principles of federalism, both of which leave it to the States, as a matter of policy, to evaluate and determine the most effective way of providing the public with appropriate information about convicted sex offenders. Dictating such a policy determination as a matter of constitutional law is especially inappropriate in this context in which the mandatory assessment the Respondents would have the Court impose is not universally accepted as either possible or accurate.[3]

The Respondents suggest that the public's need to know about convicted sex offenders can be satisfied by the availability of any known offender's conviction history, at least in the absence of individualized risk assessments. Connecticut citizens may request, for a fee, the conviction history of a person whose full and

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[3] Indeed, the Respondents' efforts to demonstrate the feasibility of sex offender risk assessment reveals what is really at stake. As evidenced by the Declarations filed with this Court, the process of risk assessment is neither easy nor inexpensive. *See, e.g., Doe v. Poritz*, 662 A.2d 367, 382-83 (N.J. 1995) (judicial review of administrative hearing, notice, right to counsel, state-provided counsel and expert witness if indigent, discovery, burden of persuasion by clear and convincing evidence on the State, and right to appeal); *Doe v. Pataki*, 3 F. Supp.2d 456, 471-72 (S.D.N.Y. 1998) (Right to counsel in assessment hearings, counsel at state expense in event of indigency, pre-hearing discovery, burden of persuasion by clear and convincing evidence borne by state, right to appeal); N.J. Pub. Dfdr. *Amicus* 10-16.

correct name and birth date is known to them. Conn. Gen. Stat. § 29-11(c). In the absence of an individualized risk assessment process, the Respondents claim, the public cannot be trusted with any other information.[4] The Respondents miss the point. It is not just that it is burdensome to require citizens to make these sorts of individualized requests, it is a far less accurate and effective means of disseminating the information.

Under the system the Respondents advocate, the following scenario would result. A single mother's acquaintance shows interest in her and her children, or offers to care for the children occasionally. If the mother seeks to inform herself with accurate conviction information regarding the acquaintance, she must either pay a fee and provide an accurate name and birth date or social security number, or she must wait until a governmental entity decides such accurate information is acceptably available to her, along with a subjective, and perhaps erroneous, label regarding that person's risk.[5] She is also precluded from inquiring as to

[4] *Amici* argue that a subjective risk assessment is necessary because the public are likely to harm or harass registrants they will perceive, from the undifferentiated Registry, to be currently dangerous. D.C. Pub. Dfdr. *Amicus* 20; N.J. Pub. Dfdr. *Amicus* 10; Assoc. Trmt. *Amicus* 9-10. The Respondents have never presented any evidence of physical threat to registrants by virtue of Connecticut's law, fully operational for over two years before the injunction, and the Department of Justice has found these concerns to be unsubstantiated. 64 Fed. Regs. 572, 582 (1999). The Respondents never presented evidence of this or other harms to registrants (which would be termed evidence of damages in a defamation case) such as loss of employment, housing, or ostracism. While such evidence would be inappropriate if offered in support of the "plus" portion of respondents' case, such evidence is appropriate in a defamation action. *Intercity Maint. Co. v. Local 254, SEIU*, 241 F.3d 82, 89 (1st Cir.), *cert. denied*, 122 S.Ct. 48 (2001). None was offered, and none required by the lower courts. Furthermore, *Amici* and the declarations filed in support of respondents mistakenly assume that there is no process by which persons challenging either their status as registrants or Registry material might do so. N.J. Pub. Dfdr. *Amicus* 14, 17-18; Assoc. Treatment *Amicus* Br. 17-18; Donovan, Johnson, Gallo, Lane, and Buncher Declrs. As the parties have stipulated, and as noted in respondents brief, however, there is such a process. Re. Br. 10; JA 12, 109.

[5] Another scenario presents itself: a boy-friend wants to co-habit with the mother and her children. *Amici* claim that offenders who have committed offenses against children within their household are unlikely to repeat offend outside their home. N.J. Pub. Dfdr. *Amicus* 9; Assoc. Trmt. *Amicus* 12-13. Living situations are, however, subject to change. Moreover, the fact that sex offenses are most often committed by persons known to the victim does not render the Registry

convicted sex offenders in her neighborhood in the absence of their birth dates, social security numbers or even names, again, unless and until a government entity adds its subjective label to the accurate information already in the government's possession. If the risk assessment is inaccurate, if the mother's request is wrong, or if information is withheld that might otherwise have been provided, the single mother and her children bear whatever risk results. All of this is claimed to be necessary in order that the public not understand any given registrant or the group of registrants to be currently dangerous. The mother is thus deprived of desirable, relevant information her State maintains but cannot share, information previously available at the touch of a button.

Connecticut's policy is sound: to provide, upon request and with relative ease, verifiable conviction information regarding convicted sex offenders, to make that information meaningful by providing context, that is, address and precise offense(s), and to avoid the cost and difficulty of predicting which specific members of a group known to offend again will do so.[6] Connecticut has modified its registration and public access law in response to an evolving understanding of how best to accommodate competing interests.[7]

irrelevant, despite *amici's* claim. Assoc. Trmt. *Amicus* 12-13. *Amici* assume erroneously that a sex offender registry is only useful in the context of a stranger assault. While this may be true regarding other forms of notification, such as a flier or media release, a computerized registry that must be accessed has more widespread application. A review of the Registry could provide information regarding a trusted or known individual. While respondents and *amici* claim that figures on sex offender recidivism are generally inflated, and vary widely depending on individual characteristics that may or may not be static, state legislatures are entitled to credit different studies than those now presented by opponents. Assoc. Trmt. *Amicus* 12-13; N.J. Pub. Dfdr. *Amicus* 8-9.

[6] The Respondents and *amici* claim that petitioners fail to recognize the value of treatment for sex offenders. Re. Br. 49 N.J. Pub. Dfdr. *Amicus* 6. This is certainly not the case. No Connecticut statute or policy discourages treatment: indeed, the State provides sex offender treatment in a variety of settings such as correctional facilities and for persons on probation. Assoc. for Treatmt. *Amicus* Br. 1. Registration and public access to registration information is viewed by some groups as beneficial to treatment and recovery for sex offenders. *See* www.calsexoffenders.net for discussion of benefits to offenders from registration.

[7] Connecticut's public acts regarding sex offender registration and/or public access include Public Acts 1994-246, 1995-142, 1998-111, 1999-183, 2001-211 and 2002-7.

The wisdom of Connecticut's choice regarding the unique problem of sex offenders, of course, is not what is before this Court. Rather, it is whether the policy choice preferred by the Respondents is constitutionally mandated. It is not.

B. The Various Aspects Of The Registry That The Respondents Fault Do Not Imply That An Individual Is Currently Dangerous.

The Respondents have several quibbles with the content and presentation of the Registry, especially on the Internet website, that they contend contribute to the purported stigma. Along with being beside the point of the Court of Appeals' holding regarding an "undifferentiated" Registry, none of the contextual characteristics give rise to a false stigma.

For example, the Respondents attempt to attribute the stigma of dangerousness to the manner in which the Registry information is displayed on the website.[8] They first complain that the very term "sex offender" automatically connotes that an individual is "the scourge of modern America." Re. Br. 23. Yet the label is indisputably accurate as to every registrant.

> The *Restatement of Torts* provides that when a statement is a specific allegation of the commission of a particular crime, the statement is true [thus not actionable] if the plaintiff did commit that crime. If the accusation is general and implies the commission of unspecified misconduct of a particular type, the statement is true if the plaintiff committed any misconduct of that type. Thus a charge that another is an embezzler is true if he committed a single act of embezzlement.

Restatement (Second) of Torts, § 581A, comment c (1977). Likewise, § 571 of the Restatement specifically provides that an imputation of the capability to commit criminal conduct is *not* sufficient: ***"[I]t is not enough merely to suggest that another is capable of committing a crime or that he would commit it if sufficient opportunity were presented. Neither is it sufficient to charge another with a criminal intention or design, if no criminal act is charged."*** *Id.*, § 571 comment c. That society considers the behavior resulting in the label of "sex offender" odious does not mean that the State may make no statement about that behavior or publicly identify those persons so convicted.[9]

The Respondents go on to claim that it is not merely the term "sex offender" that stigmatizes them, but the term "Registered Sex Offender," presumably because the term "registered" connotes a determination of dangerousness by the State. Re. Br. 23-24. But the law requiring offenders to register and the creation of a Registry by the State are not challenged – only the availability of the Registry to the public. Were the State to delete the term "registered," the Respondents' obligation to comply with registration would still exist. That the Respondents are registered, in addition to being convicted sex offenders, is, and will remain, true.

The Respondents also contend that including a registrant's current address leads ineluctably to an inference of current dangerousness because if registrants were not dangerous there would be no need for current addresses. Re. Br. 24. They can cite no authority for this proposition, however. In fact, the inclusion of address information in Connecticut's Registry does not imply danger, and the Registry explicitly disclaims any determination of individual dangerousness. The inclusion of current addresses does not imply that any single registrant is dangerous, but instead provides accurate information that makes the Registry more

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[8] The Respondents' *amicus* provides a description of Frequently Asked Questions included on the District of Columbia sex offender website. D.C. Pub. Dfdr. *Amicus* 22-23. The Connecticut website did not include any language similar to that cited from The District of Columbia website.

[9] The Respondents and their *amici* repeatedly return to their refrain that sex offenders are singled out from other convicted persons, presumably unfairly. This is an equal protection claim that is not part of this case. Nor does it have any constitutional basis. Sex offenders are not "similarly situated" to other offenders: they have committed very different offenses. Further, inasmuch as sex offenders do not make up a suspect class and regulation of them intrudes on no fundamental right, the Legislature is free to distinguish sex offenders from other offenders upon a rational basis – recidivism and the anguish their victims suffer long after the crime's commission. Finally, at best, the Respondents' claim is one of under-inclusiveness (i.e., why not require other offenders to register?). This is not a constitutional claim. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152-53 (1980); *Williams v. Lee Optical*, 348 U.S. 483, 488-89 (1955).

useful, allowing the public to search the Registry geographically and not just by name.

The Respondents argue that the disclaimer is not sufficiently prominent, and, thus, has no effect on the meaning of the Registry. Re. Br. 25. A review of the portion of the website available as an archived record, however, demonstrates that the disclaimer is both clear and prominent. Re. Br. 25, n.9. If the disclaimer were displayed even more prominently, the Respondents would still contend that the suggestion of dangerousness as to each registrant persists. Re. Br. 26. They provide no authority for the patently erroneous proposition that a disclaimer is irrelevant to the meaning of an allegedly defamatory communication. Certainly, the Court of Appeals did not disregard the disclaimer.[10] JA 249.

Given the accuracy of the information in the Registry and the presence of the disclaimer, the Respondents are forced to search far afield for defamatory meaning, resorting to legislative history and other states' caselaw and experiences. The essence of their argument is that the collective mindset of the public so reviles sex offenders that the State can make no statement, however true and objectively verifiable, that does not defame them. The law of defamation, however, has never held that

[10] Contrary to their claim that the Registry is completely undifferentiated, and thus defamatory, the Respondents also urge that the Registry is overbroad, including, for example, school children who playfully slap each other's buttocks in a school hallway in the Registry, along with much more serious sexual offenders. Re. Br. 3, citing *In re Mark R.*, 757 A.2d 636 (Conn. 2000). A minor adjudicated as a Youthful Offender, as was Mark R., is not required to register in Connecticut and thus is not included in the Registry. Conn. Gen. Stat. §§ 54-250 *et seq*. Moreover, although Connecticut's Supreme Court held that contact with a victim's buttocks satisfies the element of sexual contact for Sexual Assault in the Fourth Degree, a Class A misdemeanor included as a registrable offense, the court's inquiry went further in that case. *Id*. The court found the defendant possessed an intent to degrade or humiliate, noting a series of events in which a 12 year-old victim was restrained and chased by two students, then repeatedly slapped on the buttocks by the assailant who also tried to pull down her pants, while the other student held her arms and successfully made contact with her breasts. *Id*. Under these facts, an adult in Connecticut could in fact be convicted of Fourth Degree Sexual Assault, and required to register. Thus, the respondents chose a poor example to illustrate their point of overbreadth (which is not the constitutional claim at issue). Their representation that a mere slap on the buttocks results in inclusion in a Registry that defames schoolchildren simply does not hold up.

already unpopular persons can more easily establish defamation because of their social standing. To the contrary, because defamation typically requires proof of damage to reputation, it would seem that an already tarnished reputation is an impediment to stating a defamation claim. The Respondents' appeal to legislative history is equally unavailing. Although legislative history might have a bearing on a statute's meaning and scope, which are not in dispute here, it has no relevance in a defamation action in which the truth and effect of a published statement are the dispositive issues. Users of the Registry are not alleged to have read or to have been affected by the legislative history of Connecticut's Act.[11]

C. An Implied Defamatory Statement, Without More, Is Insufficient To Allege A Deprivation Of A Liberty Interest.

Even accepting the inference the Respondents urge, both courts and scholars have suggested that defamation by implication, without more, is not generally recognized as a basis for common law defamation actions. *See, e.g., White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990) ("[I]f a communication, viewed in its entire context merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established"); W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 116, at 117 (5th Ed. Supp. 1988) provides:

> [T]he defendant who states all the particular facts correctly, does not omit facts necessary to put them in context, and does not juxtapose the facts in a far-fetched way to create libelous implications, is not liable even if the conclusion to

[11] The Respondents and *amici* argue that a computerized collection of material is somehow more intrusive than other government information. Over half of the states use or used the Internet to make available sex offender registration information, regardless of their use of risk assessment. *See* Petition for Certiorari 15, n.15 for a listing. That technology improves accessibility to the information does not offend the Constitution. *Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, *J.*, concurring), and that the dissemination of information is improved does not make the information any less true.

> be drawn from the facts is clearly defamatory . . . . The difference . . . seems to be whether the particular facts were manipulated, omitted, or artificially juxtaposed to create untrue implications; if so, the truth of the particular facts provides no protection; if not, the truth is complete protection. .[12]

In this case, no manipulation or omission of facts can be attributed to the Registry. The Respondents' nevertheless claim that one category of facts is omitted from the Registry: namely, information regarding the results of individualized risk assessment hearings. A true statement, however, cannot be rendered defamatory because of the absence of a fact not yet known — and not even capable of being established with any reliability.

The Respondents' argument regarding group defamation is likewise unpersuasive. They claim that, because information is provided that is specific to each registrant, the group defamation theory does not apply. This argument ignores the fact that, again, as to each individual registrant, only accurate information is provided. Any inference of dangerousness that might arguably be drawn, results from the group nature of the Registry: that is, the fact that all registrants are included together, without the sort of differentiation the Respondents would like to see. The Court of Appeals likewise inferred only a statement about a group: that is, "*some* of the persons" listed. JA 250. Given this general inference regarding members of a large, undifferentiated group, as the Respondents would characterize it, the defamatory statement, if any, relates to members of the group at large, and thus, such a

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[12] The Respondents rely, as did the Court of Appeals, on *the Restatement (Second) of Torts* §§ 563, 571 (1977), for its general statement of the law regarding indirect statements as the basis for defamation, ignoring the specific rule applicable to statements of one's capability to commit crime. Recent case law and commentators reach a far more limited conclusion than the *Restatement's* general proposition that any false inference arising from the truthful information may form the basis for a defamation claims. *See also* R. Sack, *Sack on Defamation*, (3d ed. 2002) § 2.4.5 ("*In recent years*, courts have increasingly imposed limitations on recovery for libel by implication.") (emphasis added); B. Sanford, *Libel and Privacy*, § 6.6 (2d Ed. 1987 & 1997 Supp.) (noting that "*current case law* . . . deals with the issue of false implications as a subspecies of whether a news report is capable of a defamatory meaning") (emphasis added).

statement is insufficient to form the basis of a defamation action. Pt. Br. 27-29. A statement insufficient for a defamation action, *a fortiorori*, is insufficient for a claim of constitutional defamation.

D. The Alleged Implied Message Of Dangerousness Is Not Capable Of Being Proved True Or False.

Even if this Court were to accept the theory that constitutional defamation can be based on an imputed, but disclaimed, likelihood to commit criminal conduct, the Respondents fail to establish their cause of action. The Respondents ignore the dispositive issue of whether the alleged statement in this case is capable of being proved true or false. *Milkovich*, 497 U.S. at 15. This omission is fatal to the Respondents' cause.

The Court of Appeals noted: "[t]he gravamen of 'stigma' as part of a due process violation is the making under color of law of a reputation-tarnishing statement *that is false*." JA 247, citing *Codd v. Velger*, 429 U.S. 624, 627 (1977) (emphasis added). Moreover, the alleged statement must be "capable of being proved true or false." *Milkovich*, 497 U.S. at 15 ("[A] statement on matters of public concern must be *provable as false* before there can be liability under state defamation law") (emphasis added). The Respondents completely fail to address the essential element of falsity.[13] That the Respondent fail to allege a clearly discernible statement capable of being proven true or false precludes any further consideration of the Respondents' constitutional claim.[14] *Codd*, 429 U.S. at 628-29.

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[13] Certainly, the Respondents have never alleged that any inference of dangerousness is false as to the entire class of registrants or as to all registrants individually. The District Court avoided the necessity for such a claim as to all registrants, by allowing the singular named plaintiff to allege that he was not dangerous, JA 113, simultaneously declaring the law unconstitutional, then later certifying as the plaintiff class all registrants. JA 244-45; 3.

[14] Surprisingly, respondents' analysis seems to conflate the tort of defamation, and its requisite element of defamatory meaning; their entire analysis goes to the latter. The Respondents only partially quote *Codd v. Velger*, which requires a statement both "false and defamatory" in order to be sufficient, as opposed to merely "defamatory". *See Codd*, 429 U.S. at 628; Re. Br. 22. This Court used both concepts in *Milkovich*: "[Previously,] one needed only allege an unprivileged publication of *false and defamatory* matter to state a cause of action for *defamation*." *Milkovich*, 497 U.S. at 13 (emphasis added). The Respondents fail to provide this Court with a discussion of these elements.

If this Court determines that the essential message of the Registry is no more than a statement that any given registrant is more likely to be dangerous than the "average person," as did the Court of Appeals, absent any allegation that *this* statement is false or capable of being proved false, the Respondents' defamation action fails as a matter of law. *Id.* Even if the Court credits the Respondents' claim that the Registry defames all registrants as currently dangerous, the existence of a demonstrable falsehood is absent as to any particular registrant. Pt. Br. 24-25. The Respondents certainly provide no argument or evidence to the contrary.

Significantly, the Respondents do not even attempt to argue that predictions of future behavior in the form of risk assessment are at all reliable, having conceded at the Court of Appeals that such hearings are, themselves, "risky."[15] The Respondents present no studies or precedent supporting a claim that "dangerousness" is capable of being proved true or false, or even more or less likely, in any reliable way. Rather than argue the feasibility of risk assessment, their sole argument is that such relative determinations are attempted in other contexts. It is true that Connecticut, like most States, attempts approximations of future criminal conduct – for purposes of bail, parole, involuntary commitment and probation. In those situations, however, the risk assessment is made for the purpose of a custodial or placement decision that is unavoidable – an individual must be placed, treated, or supervised.[16]

But the inexact science of predicting the future for its own sake, or for the purpose of educating the public, is far different than considering relative custody or placement options. Moreover, it is a far different task than proving or disproving an historical fact necessary as an element in a defamation action. Defamation law is unique in that it speaks in the non-relative terms of "true" and "false." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975). In any event, the Respondents have

[15] *See* Transcript, oral argument, July 12, 2002, p. 7.

[16] *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary civil commitment of sex offenders); *Shall v. Martin*, 467 U.S. 253 (1984) (regarding assessment of future dangerousness in context of juvenile detainees).

provided no evidence at any time that "dangerousness" is capable of being proven "true or false," yet they themselves claim that a constitutional defamation arises from the alleged inference.

The Respondents' failure to address falsity as an element of their defamation claim likewise underscores the insufficiency of their claim under the group defamation doctrine. Any discernible imputation of dangerousness that could possibly arise results from membership in the "group" of registered sex offenders – it is an inference so amorphous and non-specific as to be incapable of verification as to any single registrant.[17] At the same time, it is statistically accurate to describe the group as a whole as more likely to commit sex offenses than the population in general, and it was perfectly rational for the Legislature to so conclude. *McKune v. Lile*, 122 S. Ct. 2017, 2024 (2002).

II. THE PUBLIC AVAILABILITY OF THE REGISTRY INFORMATION DOES NOT RESULT IN A CHANGE IN ANY PREVIOUSLY RECOGNIZED RIGHT OR LEGAL STATUS.

This Court made clear in *Board of Regents v. Roth* that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that *a person has already acquired in specific benefits.*" 408 U.S. 564, 576 (1971) (emphasis added). The Respondents have not lost, by virtue of either the registration requirements or the statute's immunity provision, any right "previously vouchsafed" by the State. *Paul v. Davis*, 424 U.S. 693, 712 (1976). All that the Respondents can assert is an alleged impairment of an unrecognized interest in avoiding the obligations arising out of their criminal convictions. This does not suffice for purposes of the Due Process Clause.

A. Because The Respondents' Registration Obligations Preexisted The Registry And Continue In Its Absence, There Is No Alteration in The Respondents' Status.

[17] Not only is the alleged defamation based on the mere possibility of an inference, the Respondent and the lower courts could not agree on the precise nature of that inference. *See supra* note 1.

Absent an action "officially removing [an] interest from the *recognition and protection previously afforded by the State,*" no liberty interest exists. *Paul,* 424 U.S. at 711 (emphasis added). The State of Connecticut has never recognized, let alone protected, the right of previously convicted persons to avoid reporting their whereabouts to law enforcement authority. Thus, the law at issue, principally enacted in 1998, removes no previously existing right. To the contrary, since 1994 Connecticut has required persons convicted of sexual assault, of whatever degree, to register in substantially the same manner as the current law. *See Roe v. Office of Adult Probation,* 125 F.3d 47, 48-49 (2d Cir. 1997) (describing the evolution of Connecticut's sex offender registration laws up to that point in time).[18] Under prior law, persons subject to the registration requirements who did not comply were guilty of a class A misdemeanor, one step below the Class D felony now applicable. Conn. Gen. Stat. § 54-102(c) (repealed 1998).[19] Unlike the current law, persons were not required to register with a centralized agency, but with "the chief of police of the police department or resident state trooper for the municipality" of residence. *Id.* That many current registrants were previously required to register, (and for that matter continue to be required to register even under the district court's injunction), demonstrates the disconnect between the purported stigma and the registration requirements. Persons already subject to registration simply suffer no change in legal status.

The Respondents claim that the law does not require a causal connection between the "stigma" and the "plus." Instead they claim that it is sufficient if the alteration of a previously existing right occurs "in the course" of the defamation.[20] Re. Br. 36 This

[18] Respondents cite to Connecticut's 1997 Public Act regarding persons previously required to register. Re. Br. 4. The 1997 Public Act, however, modified existing law. *See Roe v. Office of Adult Probation,* 125 F.3d at 48-49.

[19] Convicted sex offenders were also, as they are now, required to provide blood for DNA analysis although not suspected of any unsolved or future crime. *See Roe v. Marcotte,* 193 F.3d 72, 75 (2d Cir. 1999).

[20] The Respondents quote language from *Owen v. City of Independence,* 455 U.S. 622 (1980), that the purported "plus" need only be "in the course of" the defamatory statement. Re. Br. 36. The Court relegated its discussion of this issue in *Owen* to a footnote because respondents had not properly raised it in that case. *Id.* at 633 n. 13. *Owen* involved the termination of a municipal employee

Court's Due Process decisions require the kind of causal nexus between the alleged stigma and the plus element dispensed with by the Court of Appeals and lacking in the Respondents' allegations. For example, in *Paul,* this Court instructed that "harm or injury" to reputational interests that "does not result in a deprivation of any 'liberty' or 'property'. . . recognized by state or federal law, [or] *has [not] worked any change of respondent's status as theretofore recognized under the State's laws*" is not actionable under the Constitution. *Paul,* 424 U.S. at 712. The alleged "plus" does not even occur "in the course" of the alleged defamation. The requirement to register remains in place.

There is "no logical stopping place" to the scope of the Due Process Clause should this Court recognize an action for constitutional defamation absent any causal or temporal connection between the alleged defamation and the alteration in a previously existing right. *Paul,* 424 U.S 698. This is especially so when the "plus" requirement is met upon minimal state action. The test enunciated by the Court of Appeals amounts to little more than requiring state involvement in the alleged defamation, as result clearly contrary to *Paul's* requirements.[21] JA 271.

who was allegedly defamed by a government official the day after his termination. The Court viewed the termination and the defamatory statement as a unitary action of the government against the employee, thus constituting a liberty interest. *Id.* Unlike the termination of the government employee in *Owen,* the registration requirements here continue in place regardless of the alleged defamation. Thus, this case is more akin to an alleged defamatory statement that is made well after the adverse employment action with no necessary or obvious connection to it. *See Laureano-Agosto v. Garcia-Caraballo,* 731 F.2d 101, 104-05 (2d Cir. 1984) (Breyer, *J.*).

[21] It is incongruous, for example, for the Respondents to argue that the State is as "free"–"to notify the public regarding arrests, to publicize the name of at-large fugitives, or to announce the names of persons wanted for questioning" under the Court of Appeals' ruling. Re. Br. 37, n.11. Under the Respondents' view, the State could be liable for a constitutional tort were it to publish a website of "Wanted Fugitives". Fugitives from the law are subject to criminal prosecution not only for their underlying crime, but for their evasion of authority as well, thus, under the Respondents' analysis, the "plus" is satisfied. A registry of fugitives could result in an impression in the public that such persons might be dangerous, and certainly they would be perceived as more likely than the average persons to commit a crime, thereby meeting the "stigma" test. Any given fugitive, as yet unconvicted of any crime, could claim that, in relation to other fugitives, he is less dangerous.

B. The Immunity Contained In Connecticut's Act Is Not A Material Alteration Of A Previously Existing Right.

Paul v. Davis sought to articulate the logical limit to the procedural protections provided for under the Constitution. It was not intended as a two-factored test by which any person claiming defamation by a government entity could find any additional, loosely related governmental action and thereby limit the ability of states to fulfill their obligations. This Court was clear: "[I]nterests . . . comprehended within the meaning of either 'liberty' or 'property' . . . attain this constitutional status by virtue of the fact that they have been initially recognized and protected *by state law*." *Paul*, 429 U.S. at 710 (emphasis added). In the complete absence of state law protection from registration requirements, the Respondents now submit a novel theory that the additional "plus" element necessary to their claim can be found in an immunity provision included in the Connecticut's SORL.[22]

Not only has the immunity provision argument never before been expressed in this matter, but no court has ever based its finding of a due process violation on an immunity provision. Generally speaking, sovereign immunity is the rule, not the exception, and waiver of sovereign immunity is "a matter of grace which a [legislative body] may condition as it chooses." *Rigsbee v. United States*, 204 F.2d 70, 72 (D.C. Cir. 1953). In this case, the immunity provision at issue makes no discernible change in the rights of registrants inasmuch as the State and its actors possess immunity from actions on the basis of the Registry by virtue of sovereign immunity. As importantly, as the subject immunity provision is specific to the challenged law, it does not change any right to sue that might have existed prior to the challenged law's enactment.

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[22] The Petitioners submit that this Court should decline to address this new argument. An argument raised by a respondent for the first time in a brief on the merits is typically only addressed in "exceptional circumstances." *United States v. Estate of Romani*, 523 U.S. 517, 526 n.11 (1998) (citing *Heckler v. Campbell*, 461 U.S. 458, 468-69 n. 12 (1983)). In this case, this issue was not briefed or presented to the lower courts for consideration. Moreover, no Connecticut court has considered the scope of the new immunity provision.

The immunity provision the Respondents rely on is very specific:

> Neither the state nor any political subdivision of the state nor any officer or employee thereof, shall be held civilly liable to any registrant by reason of disclosure of any information regarding the registrant that is released or disclosed *in accordance with* subsection (a) of this section.

Conn. Gen. Stat. § 54-258(b) (emphasis added). Subsection (a) provides that the newly centralized Registry is a public record "accessible to the public during normal business hours" and requires Internet access to the centralized Registry. Conn. Gen. Stat. § 54-258(a).

This specific immunity provision cannot provide the basis for a previously recognized or protected state entitlement because the Registry was not previously centralized and made available to the public on the Internet. No right to sue the State or its officials regarding public accessibility of the centralized Registry had been previously recognized, and none has existed since then. Thus, the Respondents have exactly the same right to sue the state that they had before the statute's enactment: that is to say, they had no right to sue the state regarding a centralized Registry prior to the enactment of the law and they have none currently. The Respondents have not lost any right "previously vouchsafed to [them]" by the State. *Paul*, 408 U.S. at 576.

In addition, quite separate from the subject immunity provision, no right exists to sue either the State or a state official "by reason of disclosure of any information regarding the registrant that is released or disclosed *in accordance with subsection (a) of this section*" (emphasis added). Conn. Gen. Stat. § 54-258(b). The Respondents argue when they claim that, but for this specific immunity provision, registrants would possess a cause of action "once certain preconditions are met." Re. Br. 27. The "preconditions" are significant and preclusive. Connecticut as a state enjoys sovereign immunity, and that immunity "protects state officials from lawsuits resulting from the performance of their duty." *Hultman v. Blumenthal*, 787 A.2d 666, 672 (Conn. App. 2002) (sovereign immunity bars defamation action against state official in individual and official capacities). When a state official

takes action "representing the state" that is not in excess of his statutory authority, no suit may be brought. *Id.* at 673; *see also Shay v. Rossi,* 749 A.2d 1147, 1172 (Conn. 2000) (conduct within "statutory authority" not actionable). If either the State or a state agency or official were sued for their actions *"in accordance with"* Connecticut's law, thus triggering the immunity in § 54-258(b), sovereign immunity would also operate as a bar.[23] Therefore, the Respondents have lost no previously recognized right by inclusion of the subject immunity clause.

III. CONCLUSION

The Petitioners urge this Court to reverse the decision of the Court of Appeals and remand with instructions to vacate the injunction entered by the District Court and to enter judgment for petitioners.

Respectfully submitted,

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[23] Indeed, Connecticut enjoys sovereign immunity from *defamation* actions against the state or its officials *acting in the course of their duties* quite apart from the immunity section within the registration statutes. *Hultman*, 787 A.2d at 672.